IN THE SUPREME COURT OF THE STATE OF ALASKA

Yvonne Ito, Appellant, v. Copper River Native Association, Appellee.	)	Supreme Court No. S-17965

Trial Court Case No. 3AN-20-06229CI

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANHORAGE
THE HONORABLE DANI CROSBY, PRESIDING

APPELLANT'S RESPONSE TO THE AMICUS BRIEF OF THE UNITED STATES

NORTHERN JUSTICE PROJECT, LLC
Attorneys for Appellant

By: /s/ James J. Davis, Jr.
James J. Davis, Jr., AK Bar No. 9412140
NORTHERN JUSTICE PROJECT, LLC
406 G Street, Suite 207
Anchorage, AK 99501
(907) 308-3395 (telephone)
(866) 813-8645 (fax)
Email: jdavis@njp-law.com

Filed in the Supreme Court
of the State of Alaska, this
___ day of April, 2022

_____

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

OTHER AUTHORITIES

AUTHORITIES PRINCIPALLY RELIED UPON

AS 10.20.051. Members and liability of directors, officers, employees, and members.

(a) A corporation may have one or more classes of members or may have no members. If the corporation has one or more classes of members, the designation of the class or classes, the manner of election or appointment, and the qualifications and rights of the members of each class shall be set out in the articles of incorporation or the bylaws. If the corporation has no members, that fact shall be set out in the articles of incorporation or the bylaws. A corporation may issue certificates evidencing membership.

(b) The directors, officers, employees, and members of the corporation are not, as such, liable on its obligations.

25 U.S.C. § 5381. Definitions

…(b) Indian tribe. In any case in which an Indian tribe has authorized another Indian tribe, an inter-tribal consortium, or a tribal organization to plan for or carry out programs, services, functions, or activities (or portions thereof) on its behalf under this title, the authorized Indian tribe, inter-tribal consortium, or tribal organization shall have the rights and responsibilities of the authorizing Indian tribe (except as otherwise provided in the authorizing resolution or in this title). In such event, the term "Indian tribe" as used in this title shall include such other authorized Indian tribe, inter-tribal consortium, or tribal organization.

25 U.S.C. § 5332 Sovereign immunity and trusteeship rights unaffected

Nothing in this Act shall be construed as—

(1) affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe; or

(2) authorizing or requiring the termination of any existing trust responsibility of the United States with respect to the Indian people.

25 U.S.C. § 5396. Application of other sections of the Act

(a) Mandatory application. All provisions of sections 5(b), 6, 7, 102(c) and (d), 104, 105(k) and (l), 106(a) through (k), and 111 of this Act and section 314 of Public Law 101-512 (coverage under chapter 171 of title 28, United States Code, commonly known as the "Federal Tort Claims Act"), to the extent not in conflict with this title, shall apply to compacts and funding agreements authorized by this title.

(b) Discretionary application. At the request of a participating Indian tribe, any other provision of title I, to the extent such provision is not in conflict with this title, shall be made a part of a funding agreement or compact entered into under this title. The Secretary is obligated to include such provision at the option of the participating Indian tribe or tribes. If such provision is incorporated it shall have the same force and effect as if it were set out in full in this title. In the event an Indian tribe requests such incorporation at the negotiation stage of a compact or funding agreement, such incorporation shall be deemed effective immediately and shall control the negotiation and resulting compact and funding agreement.

INTRODUCTION

With the new briefs filed by the United States and the State of Alaska, this Court now has 307 pages of briefing about whether the Copper River Native Association ("CRNA") has tribal sovereign immunity. At the heart of this question are two issues. The first is whether this Court should overrule well-settled precedent. The second is where, if this Court is going to deviate from stare decisis, this Court should now redraw the new sovereign immunity line, i.e., whether it should now extend to all Alaska state corporations that are established by Alaska's tribes; or only those that receive Indian Self Determination and Education Assistance Act ("ISDEAA") monies; or also those that fall within the ISDEAA's definition of "Indian tribe," including the boards of directors for some of Alaska's largest for-profit corporations.[1]

Courts across the country have grappled with the bounds of tribal sovereign immunity, and have drawn lines in a range of ways. This Court drew a line in *Runyon v. Association of Village Council Presidents*[2] and held that a non-tribal entity, like CRNA, only takes on the sovereign immunity of a tribe if the tribe is a real party in interest, such that a judgment against the entity can reach the tribe's assets.[3]

---

1 State of Alaska Amicus Br. at 30-31.

2 84 P.3d 437 (Alaska 2004).

3 *Id.* at 440-41.

Under *Runyon,* this case is easy: CRNA is a corporation under Alaska law,[4] and any judgment against CRNA cannot reach the assets of its member tribes.[5] CRNA therefore does not have sovereign immunity under *Runyon.*

So CRNA, and now the United States, want this Court to either overrule or rewrite *Runyon*.[6] But, realizing that this Court is disinclined to overrule (or rewrite) its recent precedents, especially where, as here, there has been absolutely no showing of how this Court's precedent is causing any mischief in the state, CRNA and the United States have two fallback arguments.

The first is to argue that CRNA has sovereign immunity under the ISDEAA, specifically 25 U.S.C. § 5381(b).[7] The problem with this argument is that it is not supported by the weight of authority. And, the plain language of § 5381(b) never mentions sovereign immunity. And there is no legislative history that supports this reading of § 5381 either.

Their second fallback argument is to discuss "background principles of sovereign immunity" and to suggest that this Court follow those "principles" instead of *Runyon*.[8] But the principles that the United States and CRNA speak

---

4 Exc. 34.

5 AS 10.20.051(b).

6 United States Amicus Br. at 27; Appellee's Br. at 26-29.

7 United States Amicus Br. at 10; Appellee's Br. at 15.

8 United States Amicus Br. at 19.

of are varied and diverse, and are anything but uniform. Further, the fact that other courts may have decided sovereign immunity issues differently than *Runyon* proves nothing at all about why *Runyon* should now be reversed.

As the State of Alaska points out, expanding sovereign immunity creates a variety of real-world negative impacts for Alaska's citizens and governmental entities, and the impacts range from workers compensation to consumer protection to taxation.[9] These impacts are particularly worrisome where, as here, there is no real limit to the new argument being made to this Court.

None of these real-world concerns are seriously discussed or analyzed by CRNA or the United States. Overruling recent precent is one thing. Expanding tribal sovereign immunity in a haphazard fashion is another. *Runyon* is good law and nothing argued by the United States or CRNA warrants it now being overturned by this Court.

ARGUMENT

I. CRNA Does Not Have Sovereign Immunity Under *Runyon*.

As already detailed,[10] CRNA does not have sovereign immunity under *Runyon*. This is because CRNA is a corporation under Alaska law,[11] and any

---

[9] State of Alaska Amicus Br. at 8-12 (also noting issues with laws on data privacy laws, the environment, controlled substances, and discrimination).

[10] Appellant's Reply Br. 5-8

[11] Exc. 34.

judgment against it cannot reach the assets or funds of any tribes.[12]

Still, the United States argues that CRNA does have sovereign immunity under *Runyon*.[13] This parrots arguments by CRNA and another amicus,[14] and suggests that the funds of CRNA's member tribes are at risk by this litigation or an adverse judgment.[15] That is simply wrong: CRNA is a corporation under Alaska law and an adverse judgment *cannot* reach the funds of any tribes.[16]

The United States' real point is that, unless CRNA is given immunity, an adverse judgment might *indirectly* affect a tribe.[17] But this speculation was also true in *Runyon.* There, AVCP had funds and administered services for tribes, and a judgment against AVCP could indirectly impact relevant tribes.[18] However, that did not change this Court's holding that AVCP did not have

---

12 AS 10.20.051(b) ("The directors, officers, employees, and members of the corporation are not, as such, liable on its obligations"); *Runyon*, 84 P.3d at 440 (holding that the entity at issue, AVCP, was a nonprofit corporation, that its member tribes would not be liable for its obligations per AS 10.20.051(b), and that it was thus not entitled to their sovereign immunity).

13 United States Amicus Br. at 27.

14 Appellee's Br. at 26-29. The Artic Village amicus does not argue that CRNA has sovereign immunity under *Runyon*, but the TCC amicus does. Tanana Amicus Br. at 6.

15 United States Amicus Br. at 27-28 (citing trial court).

16 AS 10.20.051(b).

17 Appellee's Br. at 26-29.

18 *Runyon*, 84 P.3d at 438-441.

sovereign immunity. Neither CRNA nor any amici have explained how *Runyon* could be distinguished on this point.

In reality, when claiming CRNA has immunity "under" *Runyon,* CRNA and the United States are not applying the case. Instead, they are rewriting a test about *indirect* effects into a *Runyon* opinion that rejected this test. In any judgment against an entity related in any way to a tribe, indirect effects can arise. But if that confers sovereign immunity, then *Runyon* means nothing.

At bottom, no party has shown how an adverse judgment could directly bind the funds of CRNA's member tribes. None could. Nor has any party identified a meaningful distinction for why *Runyon* would apply to AVCP, but not CRNA.[19] Thus, CRNA does not have sovereign immunity under *Runyon*.

II. 25 U.S.C. § 5381(b) Does Not Give Sovereign Immunity to CRNA.

The United States argues that 25 U.S.C. § 5381(b) creates sovereign immunity for CRNA.[20] But this overlooks too much. It overlooks how the plain language of § 5381(b) never mentions sovereign immunity. It overlooks how § 5381(b) is just a definitional provision of the Indian Self-Determination and Education Assistance Act ("ISDEAA"). It overlooks other statutory provisions

---

[19] As the State of Alaska noted, even in an unlikely scenario in which an entity might have sovereign immunity despite a tribe not being bound by its debts, "this is not that case" and the "facts of this case are indistinguishable in all relevant respects" from *Runyon*. State of Alaska Amicus Br. at 4.

[20] United States Amicus Br. at 10; Appellee's Br. at 15.

within the ISDEAA that show that the law does not affect sovereign immunity. It overlooks how there is zero legislative history to support § 5381(b) conferring sovereign immunity. And it overlooks the practical reality that this reading of § 5381(b) would lead to absurd and unsavory consequences.

A. The plain language of 25 U.S.C. § 5381(b) does not confer sovereign immunity, and the textual arguments of the United States and CRNA only solidify this.

The plain language of § 5381(b) never mentions sovereign immunity at all, let alone expanding it to new entities. The statute provides:

> In any case in which an Indian tribe has authorized another Indian tribe, an inter-tribal consortium, or a tribal organization to plan for or carry out programs, services, functions, or activities (or portions thereof) on its behalf under this subchapter, the authorized Indian tribe, inter-tribal consortium, or tribal organization shall have the rights and responsibilities of the authorizing Indian tribe (except as otherwise provided in the authorizing resolution or in this subchapter). In such event, the term "Indian tribe" as used in this subchapter shall include such other authorized Indian tribe, intertribal consortium, or tribal organization."

With no mention of sovereign immunity in § 5381(b), the United States promotes an implied reference, where "rights" passed to a new entity would include a tribe's sovereign immunity.[21] This parrots an argument by CRNA.[22]

Yet, when read in context, the "rights" in § 5381(b) simply reference those rights that are otherwise given to a tribe under the statutes containing

---

[21] United States Amicus Br. at 10.

[22] Appellee's Br. at 15.

§ 5381(b), i.e., Title V of the ISDEAA. A passing mention of "rights" does not pass all rights whatsoever.

The more that the United States quibbles with this, the worse it fares. Namely, it argues that § 5381(b) sometimes uses the limiting language of "under this subchapter," but that it does not use such language in the clause addressing the "rights" given to a new entity, so those rights are thus unlimited and include sovereign immunity.[23]

This premise is false. Really, when § 5381(b) notes that "rights" can pass to a new entity, it does so at the end of a sentence that is limited by the phrase "under this subchapter." A cleaned-up version of § 5381(b) illustrates the point:

> In any case in which an Indian tribe has authorized an inter-tribal consortium to carry out programs on its behalf under this subchapter, the inter-tribal consortium shall have the rights and responsibilities of the authorizing Indian tribe.

So, per the logic of the United States – where the words "under this subchapter" can limit a provision to reach only Title V of the ISDEAA – the

---

[23] United States Amicus Br. at 13; See 25 U.S.C. § 5381(b) (emphasis added) ("In any case in which an Indian tribe has authorized another Indian tribe, an inter-tribal consortium, or a tribal organization to plan for or carry out programs, services, functions, or activities (or portions thereof) on its behalf *under this subchapter*, the authorized Indian tribe, inter-tribal consortium, or tribal organization shall have the rights and responsibilities of the authorizing Indian tribe (except as otherwise provided in the authorizing resolution or *in this subchapter*). In such event, the term "Indian tribe" as used *in this subchapter* shall include such other authorized Indian tribe, intertribal consortium, or tribal organization.")

sentence in § 5381(b) that confers "rights" on a new entity uses those very words. This proves the point that the United States was resisting.

If the United States is arguing, as CRNA did,[24] that § 5381(b) needed to repeat "under this subchapter" even more times, a mundane example shows otherwise. Consider the sentence: "if we go fishing at the lake, we can share gear." The "gear" clearly refers to gear for fishing at the lake, not sharing all gear of all sorts in all contexts at all times. The sentence need not be tortured into: "if we go fishing at the lake, we can share gear for fishing at the lake."

Further, even if the "rights" noted in § 5381(b) were broader than those given to a tribe under Title V of the ISDEAA, they still would not envelop sovereign immunity. While the United States can dredge up select times that sovereign immunity has been called a "right,"[25] courts, including this one, more typically refer to it as a legal defense or jurisdictional bar,[26] not a right.

Meanwhile, the whole argument ignores how § 5381(b) concerns "rights *and responsibilities.*" Per the logic of the United States and CRNA, § 5381(b) would thus give CRNA all "responsibilities" of its member tribes, regardless of if they pertain to Title V. It is unclear how this would make sense or work.

---

24 Appellee's Br. at 20.

25 United States Amicus Br. at 11.

26 *See e.g., Douglas Indian Ass'n v. Cent. Council of Tlingit & Haida Indian Tribes of Alaska*, 403 P.3d 1172, 1177.

In sum, with manufactured vagueness and an attenuated conception of "rights," the United States and CRNA try to morph § 5381(b) to impliedly confer sovereign immunity. Yet in reality, § 5381(b) never mentions sovereign immunity or confers it on new entities, but instead simply confers the "rights and responsibilities" otherwise given to tribes under Title V of the ISDEAA.

B. The broader statutory context of 25 U.S.C. § 5381(b), as simply a definitional provision within the ISDEAA, confirms that it does not pass sovereign immunity to new entities.

If read in context with the ISDEAA, it is even clearer that § 5381(b) does not concern sovereign immunity. Section 5381 is simply a provision of Title V of the ISDEAA that is titled "Definitions." And as a definitional provision, it simply defines various terms, including "Indian Tribe" in § 5381(b).

This context confirms that § 5381(b) would be an odd vehicle to confer sovereign immunity. As the State of Alaska also notes,[27] it would not only be strange for Congress to greatly expand sovereign immunity in a provision that never says "sovereign immunity," but it would be doubly strange for it to do so in a definitional subsection of an ISDEAA amendment.

The United States and CRNA side-step this with broad musings about the ISDEAA. They claim that Title V expanded the ISDEAA so tribes could authorize new entities to compact, and that § 5381(b) "furthers that purpose"

---

[27] State of Alaska Amicus Br. at 27.

by passing sovereign immunity to those new entities.[28] They claim that this is necessary to put those new entities on the "same footing" as tribes and that, otherwise, tribes would be discouraged from utilizing Title V.[29]

These are leaps. While Title V did open compacting to new entities, that does not mean that its purpose was to expand sovereign immunity to those new entities, or to bestow sovereign immunity on preexisting state corporations.

What Congress was attempting to do was simpler and less audacious than what the United States is now claiming. When Congress initially enacted the ISDEAA, it allowed tribes to contract with the federal government to provide services.[30] Yet under this scheme, a tribe could have many different ISDEAA contracts for many different services, which was onerous.[31] So, when Congress added Title V to the ISDEAA, it allowed a tribe to negotiate a single compact for all of the services that it was administering, and it also allowed a tribe to authorize another entity to compact on its behalf.[32]

---

28 United States Amicus Br. at 12; Appellee's Br. at 18.

29 United States Amicus Br. at 12-13; Appellee's Br. at 18.

30 Pub. L. No. 93-638, 88 Stat. 2203 (1975).

31 Pub. L. No. 100-472, 102 Stat. 2285 (1988).

32 Pub. L. No. 106-260, 114 Stat. 711 (2000).

This further reveals the limited reach of § 5381(b). After all, Title V has many provisions about an "Indian tribe" compacting with the government.[33] And so when § 5381(b) defines an "Indian tribe" to potentially include other entities, it just clarifies that the term can include another entity that a tribe has authorized to compact for it. This is needed as, otherwise, every time that "Indian tribe" is mentioned in Title V, it would need to include copious qualifying language to advise that another entity could be involved instead.[34]

At bottom, it makes sense and is common for a definitional provision to define terms or simplify the language used in the rest of a statute. What makes no sense, though, and what is unprecedented, would be for a definitional provision to drastically expand sovereign immunity without mentioning it.

C. 25 U.S.C. § 5332 forbids the ISDEAA from affecting sovereign immunity, and is further statutory context for why 25 U.S.C. § 5381(b) does not pass sovereign immunity to new entities.

25 U.S.C. § 5332 is titled "sovereign immunity and trusteeship rights unaffected." It states that the ISDEAA cannot be construed as "affecting,

---

[33] *See e.g.,* 25 U.S.C. § 5384.

[34] Consider 25 U.S.C. § 5389(d). It states that "[t]he Indian tribe shall assume responsibility for the successful completion of the construction project in accordance with the negotiated construction project agreement." Yet without § 5381((b), this provision – and the many others like it – would need to be substantially reworded to indicate that it could cover an "Indian tribe" or sometimes an "inter-tribal consortium" or "tribal organization," as well as the conditions under which such a substitution would be appropriate.

modifying, diminishing, or otherwise impairing" tribal sovereign immunity.[35] Congress explicitly reaffirmed this provision when it amended the ISDEAA.[36]

This is more context for why § 5381(b) is not about sovereign immunity. Indeed, to give immunity to a new entity would flout § 5332 by "affecting,"[37] or "modifying,"[38] sovereign immunity. It would also be strange for § 5332 to forbid the ISDEAA from affecting immunity, only for § 5381(b) to do just that.

Yet the United States promotes a strange reading of § 5332, where the provision would forbid impairments to sovereign immunity yet condone the creation of new immunities.[39] The United States argues that, per "established

---

35 25 U.S.C. § 5332 ("Nothing in this chapter shall be construed as (1) affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe; or (2) authorizing or requiring the termination of any existing trust responsibility of the United States with respect to the Indian people.").

36 25 U.S.C. § 5396 (Congress codified this provision when adding Title V to the ISDEAA, and the provision reiterated that 25 U.S.C. § 5332 would apply to all compacts and funding agreements authorized under Title V).

37 *See e.g., New York v. United States DOJ,* 951 F.3d 84, 119 (2d Cir. 2020) (Webster's Third New International Dictionary defines "affect" as "to produce a material influence upon," and Black's Law Dictionary (9th ed. 2009) similarly defines "affect" as "to produce an effect on [or] influence in some way."); *United States v. SKW Metals & Alloys, Inc.*, 195 F.3d 83, 90 (2d Cir. 1999) ("'to affect' expresses a broad and open-ended range of influences.").

38 *See e.g., S. Appalachian Mt. Stewards v. Red River Coal Co.*, 992 F.3d 306, 311 (4th Cir. 2021) (citing Black's Law Dictionary (6th ed. 1979)) (To "modify" is to "alter; to change in incidental or subordinate features; enlarge, extend; amend; limit, reduce.").

39 United States Amicus Br. at 15.

principles of statutory construction," because the list in § 5332 ends with a "catch-all" of "otherwise impairing," the other words like "affecting" or "modifying" should thus mean something similar to "impairing."[40]

For an "established principle," some cases cited by the United States are irrelevant,[41] or stretches,[42] which would not aid CRNA. Regardless, even if "established," this principle does not apply. Per the principle, a final clause should only apply to a whole list if it can apply "as much to the first and other words as to the last."[43] For example, the words "other intoxicating" equally

---

40 *Id.*

41 First, *United States v. United Verde Copper Co.*, 196 U.S. 207, 213 (1905) concerns a list of words giving meaning to a clause that followed them. That is the reverse of the "principle" being promoted. Indeed, *United Verde Copper Co.* was about what "other domestic purposes" meant in a regulation on cutting timber "for building, agricultural, mining, or other domestic purposes." The government wanted to limit "other domestic purposes" to household purposes. Yet the Court ruled that "other domestic purposes" included other industries – like ore roasting – besides the enumerated industries of building, agriculture, or mining. So, the case involved the meaning of "other domestic purposes" arising from preceding terms, not the other way around.

42 Or, while *Federal Mar. Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726 (1973) tangentially mentions the "principle," it does so as an afterthought, and instead focuses on how all words in a list of seven can give meaning to each other. It was an antitrust case. It considered a list of seven, where only the third category arguably allowed an anomalous result. The Court noted that the other six provisions, including a final catch-all, made it unlikely that the third category should allow an anomalous result, and held accordingly. In support, the Court also cited a canon about strictly construing antitrust exemptions. The use of the "principle" advocated by the United States here was slight.

43 *Paroline v. United States*, 572 U.S. 434, 447 (2014); *United States v. Standard Brewery*, 251 U.S. 210, 218 (1920) (internal citations and quotations

apply to all words in a list of "beer, wine, or other intoxicating liquors." After all, beer and wine can be intoxicating, just like liquors, and it makes sense for this entire list to concern "intoxicating" beverages.[44]

Yet this condition – of a final clause equally applying to a whole list – is unsatisfied in § 5332. The words "otherwise impairing" do not equally apply to "affecting, modifying, [or] diminishing." That would make no sense. Instead, "otherwise impairing" just refers to the immediately preceding word of "diminishing." Thus, the principle cited by the United States does not apply.

Many examples foil the United States. Take a contractor skilled in "building, remodeling, demolishing, or otherwise deconstructing" houses. The term "otherwise deconstructing" may refer to "demolishing," but certainly not to the words "building" or "remodeling." Other examples abound.[45]

---

omitted) (where several words are followed by a general expression, "which is as much applicable to the first and other words as to the last, that expression is not limited to the last, but applies to all.")

[44] This example comes from *United States v. Standard Brewery*, 251 U.S. 210, 218 (1920). That was a dispute over how "other intoxicating" applied in a prohibition on using products to make "beer, wine, or other intoxicating malt or vinous liquor for beverage purposes." An issue was if non-intoxicating beer was included in this prohibition. The United States Supreme Court held that it was not, that "other intoxicating" applied equally to all words in the list, and that thus non-intoxicating beer was exempted from the prohibition.

[45] Consider a chef skilled in "grilling, roasting, smoking, or otherwise preserving" meats. The term "otherwise preserving" may refer to "smoking," but certainly not to the words "grilling" or "roasting." Or, consider a regulation that prohibits the hunting of "bears, ducks, deer, or other animals with antlers." This would not refer to ducks with antlers.

This highlights recent caution by the United States Supreme Court: "canons are useful tools, but it is important to keep their limitations in mind."[46] Indeed, as Justice Alito noted about overuse of the similar "series-qualifier" canon, such principles are "highly sensitive to context" and can bow to commonsense.[47] Per Justice Alito, if a dog "wags his tail and barks loudly" when a human returns, it does not mean that the dog wags his tail loudly.[48]

Given the frailties with its wordplay of § 5332, the United States tries to sap the provision in two other ways. First, it hints that passing a tribe's sovereign immunity to a new entity would not "affect, modify, diminish, or otherwise impair" the immunity *of the tribe* and would instead only do so for

---

[46] *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1173 (2021) (Alito, J., concurring in judgment); *see also id. at* 1175 ("Statutes are written in English prose, and interpretation is not a technical exercise to be carried out by mechanically applying a set of arcane rules. Canons of interpretation can help in figuring out the meaning of troublesome statutory language, but if they are treated like rigid rules, they can lead us astray. When this Court describes canons as rules or quotes canons while omitting their caveats and limitations, we only encourage the lower courts to relegate statutory interpretation to a series of if-then computations. No reasonable reader interprets texts that way.").

[47] *Id.* (citing A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 147 (2012) (Reading Law) (the "series-qualifier" canon is "when there is a straightforward, parallel construction that involves all nouns or verbs in a series, a modifier at the end of the list normally applies to the entire series.").

[48] *Id.* at 1174.

the new entity.[49] This is wrong too. The immunity comes from a tribe in the first place, so of course it is "affected" when extended to a new entity.[50]

Second, the United States notes that § 5332 only applies to the extent that it does not conflict with § 5381(b).[51] However, this retort is only half-baked. Yes, if § 5381(b) passed sovereign immunity to new entities, it might do so even though § 5332 otherwise forbids effects on sovereign immunity. Yet § 5332 is instructive not just in itself, but for the context that it provides about § 5381(b). It would be peculiar for § 5332 – which is the part of the ISDEAA that actually discusses sovereign immunity – to disclaim the ISDEAA having any effect on sovereign immunity, but for § 5381(b) of the ISDEAA to significantly affect sovereign immunity without mentioning it. And it is that peculiarity that provides even more context for why 5381(b) does not actually concern sovereign immunity.

In all, § 5332 forbids any effect on sovereign immunity in the ISDEAA. This gives more context for why § 5381(b) is not about sovereign immunity, and why it does not confer it on new entities.

---

[49] United States Amicus Br. at 15.

[50] If drivers of a car are insured, and a new driver is added to insurance for that car, would the insurance be affected? Yes. If a corporate shareholder extends their voting rights to a proxy, are the rights modified? Yes.

[51] United States Amicus Br. at 16 (citing 25 U.S.C § 5396(a)).

D. The legislative history of the ISDEAA, which says nothing on expanding sovereign immunity, further shows that 25 U.S.C. § 5381(b) does not pass sovereign immunity to new entities.

Legislative history also disfavors CRNA. Indeed, the United States and CRNA cite no legislative history at all to show that § 5381(b), or the ISDEAA overall, was intended to in any way expand or extend sovereign immunity.

Instead, the United States cites legislative history about how § 5332 would help to preserve the sovereign immunity of tribes.[52] And it claims that, thus, § 5381(b) was intended to pass sovereign immunity to new entities.[53]

This is another fallacy. § 5332 can preserve the sovereign immunity of tribes without § 5381(b) expanding that sovereign immunity to new entities. Both things are true. Preserving immunity is not the same as expanding it.

Meanwhile, and more germane, the legislative history of § 5381(b) itself never mentions sovereign immunity at all. Instead, that legislative history focuses on § 5381(b) allowing new entities to participate in Title V.[54]

If Congress really intended to radically extend something as notable as sovereign immunity, that would have engendered at least some scintilla of a

---

52 United States Amicus Br. at 16.

53 *Id.*; *see also* Appellee's Br. at 18-19.

54 H.R. Rep. No. 106-477, at 19 (1999) ("This definition enables an Indian tribe to authorize another Indian tribe, inter-tribal consortium or tribal organization to participate in self-governance on its behalf. The authorized Indian tribe, inter-tribal consortium or tribal organization may exercise the authorizing Indian tribe's rights as specified by tribal resolution.").

debate or legislative record. It did not. And as the United States Supreme Court has noted, such a lack of a legislative record can make it very unlikely that Congress intended to enact sweeping changes.[55] The same applies here.

E. It would not be administrable for 25 U.S.C. § 5381(b) to pass sovereign immunity to new entities.

Besides language and context and history, practical concerns abound. First, when CRNA argues that § 5381(b) gives sovereign immunity to new entities, it argues this without limitation.[56] In other words, for any entity that is authorized by a tribe to perform any functions under Title V of the ISDEAA, the entity would have sovereign immunity in all contexts, without limits.[57]

---

[55] *See e.g., Dep't of Commerce v. U.S. House of Representatives,* 525 U.S. 316, 342 (1999) (rejecting an argument that the Census Act allowed a method of sampling and, in support, noting that "[a]t no point during the debates over these amendments did a single Member of Congress suggest that the amendments would so fundamentally change the manner in which the Bureau could calculate the population for purposes of apportionment."); *Chisom v. Roemer*, 501 US 380, 396 (1991) ("We reject that construction because we are convinced that if Congress had such an intent, Congress would have made it explicit in the statute, or at least some of the Members would have identified or mentioned it at some point in the unusually extensive legislative history of the 1982 amendment."); *Church of Scientology of Cal. v. IRS,* 484 U.S. 9, 17-18 (1987) (rejecting an argument that tax return information was exempt under FOIA and, in support, noting that Congress would not have quietly and seamlessly adopted an amendment to permit disclosure of such tax return information).

[56] Appellee's Br. at 15-21.

[57] *Id.* at 18-19 (arguing that "under § 5381, a P.L. 93-638 inter-tribal consortium is entitled to assert sovereign immunity from unconsented suit, just as an individual tribe participating in self-governance could.")

This would go too far. After all, tribes can authorize a range of entities to preform Title V functions,[58] including for-profit corporations.[59] And those entities can perform a range of other functions, some which are separate from Title V functions and some which are intertwined with them.[60] So, per CRNA, § 5381(b) would pass sovereign immunity not just to new entities, but to new entities that only preform some or even nominal functions under Title V.

When the United States argues that § 5381(b) passes sovereign immunity to new entities, it recognizes the above problem and invents a fix out of whole cloth. It claims that § 5381(b) would not pass immunity to an entity in all instances, but only when an entity performs functions under Title V.[61]

This is inconsistent. Earlier, the United States and CRNA vigorously argue that the "rights" passed by § 5381(b) extend far beyond those in Title V of the ISDEAA.[62] Yet now the United States also argues that any sovereign

---

58 25 U.S.C. § 5381(b) contemplates the authorization of "another Indian tribe, an inter-tribal consortium, or a tribal organization." Meanwhile, "Indian tribe" is defined 25 U.S.C. § 5304(d), "inter-tribal consortium" at 25 U.S.C. § 5381(5), and "tribal organization" at 25 U.S.C. § 5304(l).

59 State of Alaska Amicus Br. at 30-31.

60 This is not a remote hypothetical. As CRNA admits about even *Runyon*, the similar entity of AVCP had a P.L. 93-638 contract, but also administered other services, like Head Start. Appellee's Br. at 29.

61 United States Amicus Br. at 16-17.

62 *Id.* at 10; Appellee's Br. at 15.

immunity passed by § 5381(b) would not at all extend beyond Title V.[63] The United States never justifies this double standard.

Regardless, this proposed rule is also problematic in itself. For any entity other than one that solely performs functions under Title V, courts could be left with cloudy inquiries about where Title V functions start and end. This could be notably difficult for an entity with many functions that are aside from or intertwined with Title V functions. How would sovereign immunity apply vis-à-vis an employee who performs *some* work under Title V, but *some* work that is separate from Title V? Or, how would sovereign immunity apply vis-à-vis an entity that has limited functions under Title V, but when those same functions are intertwined with other of the entity's operations?

It is also unclear if courts could even conduct such an inquiry. It is unreasonable enough for mistreated employees to parse out Title V funding at the pleading phase. And tribal sovereign immunity is a jurisdictional bar,[64] so an employee could be denied the discovery necessary to ever address sovereign immunity. Thus, even if this rule made sense, it could still have a practical effect of foreclosing any lawsuit against any entity with any Title V functions.[65]

---

63 United States Amicus Br. at 16-17.

64 *Douglas Indian Ass'n*, 403 P.3d at 1177.

65 Even here, the United States claims "it is uncontested" that CRNA was sued for "employment actions it took in the course of carrying out a Title V

All of this is why the State of Alaska was correct to note that "sovereign immunity applies to entities, not claims."[66] Otherwise, the potential and part-time immunity of an entity will depend on forensic accounting as to funding, and speculation as to how entity functions were carried out, and by which supervisors or executives, all of which will be burdensome to gather, and wholly imprecise, and completely unprecedented.

Nor is it availing when the United States tries to analogize to select instances in which sovereign immunity can depend on the kind of a claim, the location of an act, or the kind of an act.[67] None of that parallels this case. And none of it legitimizes the far different idea of characterizing conduct as "sovereign" based not on the kind of conduct itself or where it happened, but based on how it was funded and/or if it arose purely from a certain compact.

In short, these theories about § 5381(b) not only lack support in text or context or history, but in practicality. They "hide an elephant in a mouse hole,"[68] and would be impossible to administer. And just as the United States

---

compact." United States Amicus Br. at 17. The fact of the matter is that this issue has not been litigated. It is possible that some of CRNA's misconduct was funded or carried out pursuant to other funding or programming.

66 State of Alaska Amicus Br. at 30 (also cautioning that "extending sovereign immunity to tribal consortia would make those consortia immune from suit even when engaging outside the scope of ISDEAA contracts.").

67 United States Amicus Br. at 17-18.

68 State of Alaska Amicus Br. at 30.

Supreme Court has looked to administrability issues in construing statutes,[69] this is yet another reason to reject CRNA's argument about § 5381(b).

F. There are no analogs for a statute, like 25 U.S.C. § 5381(b), passing sovereign immunity to new entities.

The arguments of the United States and CRNA are not only novel in the context of the ISDEAA, but in the context of statutes in general. As the State of Alaska notes, there are not solid examples of Congress enlarging or expanding tribal sovereign immunity to new entities by way of legislation.[70] And the United States and CRNA have not done the work of showing why, even if Congress maybe intended to do so, it would even be permitted to do so.

III. CRNA and the United States Have Not Carried Their Burden of Showing Why *Runyon* Should Be Overturned.

The United States and CRNA give this Court long recitations of how other courts have drawn lines around extensions of sovereign immunity, and suggest that this Court do the same.[71]

This argument disregards stare decisis. That rule imposes a "heavy threshold burden" of showing "compelling reasons for reconsidering the prior

---

69 *See e.g., Robers v. United States,* 134 S. Ct. 1854, 1858 (2014).

70 State of Alaska Amicus Br. at 31.

71 Appellee's Br. at 30-37; United States Amicus Br. at 28.

ruling."[72] And this Court will "only" overrule a decision if "clearly convinced that (1) the rule was originally erroneous or is no longer sound because of changed conditions, and (2) that more good than harm would result from a departure from precedent."[73]

Here, despite thorough briefing, including many amicus briefs, this Court still has zero examples before it of *Runyon* leading to harm. While CRNA and the United States and other amici speculate about how *Runyon* could theoretically be bad, they fail to give this Court one actual example.

Similarly, CRNA and amici fail to engage with whether *Runyon* was "erroneous." Just because different courts might take divergent approaches to a legal issue, that alone does not render one approach any more "erroneous" than another. Nor does a decision from this Court become "erroneous" just because the Ninth Circuit takes a different tact.

IV. This Court is not Duty-Bound to Follow Federal Courts that Disagree with *Runyon* Especially where, as here, a State Corporation is at Issue.

The United States argues that this Court should follow the "background principles of sovereign immunity" and even claims that there is a "proper test"

---

[72] *Thomas v. Anchorage Equal Rights Comm'n*, 102 P.3d 937, 943 (Alaska 2004).

[73] *Wassillie v. State*, 411 P.3d 595, 611 (Alaska 2018) (second and third alterations in original) (citing *Thomas*, 102 P.3d at 943).

for determining how to extend tribal sovereign immunity.[74] In fact, neither exist: courts across the country have reached diverse conclusions on the issue of extending sovereign immunity and the courts have adopted a variety of tests.[75] Some courts have even emphasized, a la *Runyon*, that a suit's impact on tribal assets is the critical issue.[76]

The United States' review of cases around the country also ignores a key distinction: here, we are dealing with an entity that incorporated under state law. As noted by the State of Alaska, even if sovereign immunity could arise for some tribal consortia, incorporation under state law typically waives immunity.[77] At the least, there is obvious tension in the notion that an entity can avail itself of state corporate legal protections, but not be subject to state law, and that tension – which was already explored and reconciled in *Runyon* – is yet another reason for not overturning the opinion.

NORTHERN JUSTICE PROJECT, LLC
Attorneys for Appellant

Date: 4/18/2022 By: /s/ James J. Davis, Jr.
James J. Davis, Jr., AK Bar No. 9412140

---

74 United States Amicus Br. at 21.

75 *See e.g., People ex rel. Owen v. Miami Nation Enters.,* 386 P.3d 357 (Cal. 2016) (sampling diverse approaches).

76 *See e.g., Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp.,* 25 N.E.3d 928, 935 (N.Y. 2014)

77 State of Alaska Amicus Br. at 17.

CERTIFICATE REQUIRED BY APPELLATE RULE 513.5(C)(2)

Undersigned counsel certifies that the typeface used in this brief is 13-point (proportionally spaced) Century Schoolbook.

Date: 4/18/2022 By: /s/ James J. Davis, Jr.
James J. Davis, Jr., AK Bar No. 9412140

IN THE SUPREME COURT FOR THE STATE OF ALASKA

YVONNE ITO, Appellant, vs. COPPER RIVER NATIVE ASSOCIATION, Appellee.	)	Superior Court No. S-17965

Trial Court Case No. 3AN-20-06229CI

CERTIFICATE OF SERVICE

I, Nicholas Feronti, hereby certify that on April 18, 2022, I served the *Appellant's Response to the Amicus Brief of the United States* on:

- Richard Monkman, counsel for the appellee, at rdm@sonosky.net;
- Nathaniel Amdur-Clark, counsel for the appellee, at nclark@sonosky.net;
- Erin Dougherty Lynch of the Native American Rights Fund, counsel for Amici Curiae, at dougherty@narf.org;
- Matthew Newman of the Native American Rights Fund, counsel for multiple Amici Curiae, at mnewman@narf.org;
- Maggie Massey of the Native American Rights Fund, counsel for multiple Amici Curiae, at massey@narf.org;
- Nicholas J.R. Gasca, counsel for Amicus Curiae the Tanana Chiefs Conference, at nicholas.gasca@tananachiefs.org;
- Martin Totaro, counsel for Amicus Curiae the United States, at martin.v.totaro@usdoj.gov;
- Laura Wolff, counsel for Amicus Curiae the State of Alaska, at laura.wolff@alaska.gov.

DATED this 18th day of April, 2022

/s/ Nicholas Feronti
Nicholas Feronti